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No. ....
IN THE

Supreme Court of the United States

October Term, 1980

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. Whether the lower federal courts encroached upon the primary jurisdiction of the Interstate Commerce Commission by refusing to refer the issues of tariff interpretation and application to the Commission.

2. Whether the lower federal courts erred in excluding petitioner's evidence of local or trade usage under the tariff and in applying the rules of tariff interpretation, thereby reaching an interpretation which subjected defendant to criminal liability for violations of the Elkins Act.

3. Whether the lower federal courts erred in refusing to permit the petitioner to introduce evidence in support of its defense of good faith interpretation of the tariff and refusal to instruct the jury in good faith interpretation defense as enunciated in *Lehigh Coal & Nav. Co. v. United States*, 250 U.S. 556 (1919).

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, The Atchison, Topeka and Santa Fe Railway Company, a Delaware corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on October 10, 1980.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is an unpublished opinion entered on October 10, 1980. A copy of the opinion is included in the appendix as Exhibit A.

The Memorandum of Decision and Order of the District Court for the Central District of California denying motions

filed by petitioner for arrest of judgment, judgment of acquittal, and for a new trial, was entered on March 12, 1980, and is included in the Appendix as Exhibit C.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit, affirming judgment of the District Court for the Central District of California, was entered on October 10, 1980. Rehearing was denied without comment on January 26, 1981 and that order is included in the Appendix as Exhibit B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statute Involved.

Petitioner was prosecuted for violation of the Elkins Act, 49 U.S.C. §41(1). Said section is set forth in entirety in the appendix as Exhibit D.

Statement of the Case.

The Atchison, Topeka and Santa Fe Railway Company,[1]

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[1]The following listing of parent, subsidiary and affiliate corporations of The Atchison, Topeka and Santa Fe Railway Company is provided pursuant to Supreme Court Rule 28.1:

Parent company — Santa Fe Industries, Inc.

Subsidiary companies —

Advertising Directions, Inc.
Alameda Belt Line
B & C General Agency, Inc.
The Belt Ry. Co. of Chicago
Central California Traction Co.
The Clinton and Oklahoma Western R. R. Co.
The Denver Union Terminal Ry. Co.
The Dodge City and Cimarron Valley Ry. Co.
Fresno Interurban Ry. Co.
Gallo Wash Coal Company
The Garden City, Gulf and Northern R. R. Co.
Global Security Company, Inc.
The Gulf and Inter-State Ry. Co. of Texas
Gulf Central Pipeline Co.
Gulf Central Storage and Terminal Co.
Gulf Central Storage and Terminal Co. of Nebr.

hereinafter referred to as "Santa Fe", was indicted in March of 1979 for fifty (Counts 1 through 50) alleged violations

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Haystack Mountain Development Co.
Hospah Coal Company
Houston Belt & Terminal Ry. Co.
Joliet Union Depot Co.
Kansas City Terminal Ry. Co.
The Kansas Southwestern Ry. Co.
Kirby Forest Industries, Inc.
Los Alamos Constructors, Inc.
Los Angeles Junction Railway Co.
McKee Development Services, Inc.
Robert E. McKee, Inc.
The Oakland Terminal Railway
Oklahoma City Junction Railway Co.
Pintada Coal Company
The Pueblo Union Depot and R. R. Co.
The Pullman Company
Rio Grande, El Paso and Santa Fe R. R. Co.
St. Joseph Terminal R. R. Co.
San Diego Pipeline Co.
Santa Fe Energy Co.
Santa Fe Energy Co. of Seychelles, Inc.
Santa Fe Energy Products Co.
Santa Fe Forwarding Company
Santa Fe Industrial Realty Co.
Santa Fe Industries, Inc.
Santa Fe Land Improvement Co.
Santa Fe Mining, Inc.
Santa Fe Natural Resources, Inc.
Santa Fe Oil Co.
Santa Fe Pacific R. R. Co.
Santa Fe Pipeline Co.
Santa Fe Pipelines, Inc. (Delaware)
Santa Fe Rail Equipment Company
Santa Fe Terminal Services, Inc.
The Santa Fe Trail Transportation Company
Santa Fe Transportation Co. (California)
Security Guard Service, Inc.
Southwest Pipe Line Company
Standard Office Building Corporation
Star Lake Railroad Company
Sun Country Construction Co.
Sunset Railway Co.
Texas City Terminal Ry. Co.
Toledo, Peoria & Western Railroad Co.
Trailer Train Company
Walker-Kurth Lumber Co.
The Wichita Union Terminal Ry. Co.
The Zia Company

of the Elkins Act, 49 U.S.C. §41(1). The case was prosecuted in the District Court for the Central District of California pursuant to 49 U.S.C. §41(1). Said Act, as relevant here, prohibits a railroad from knowingly granting a shipper a rebate or concession from the rate established in tariffs published and filed with the Interstate Commerce Commission, hereinafter referred to as "ICC".

The conduct which allegedly constituted the violations was not disputed: Santa Fe provided temporary California licenses (referred to as 5-day trip permits) on rail owned or rail controlled "piggyback" trailers which had moved via rail transportation from points in the East and Midwest to Los Angeles, California, during the year 1975. As to the fifty trailers cited in the fifty counts, each was a rail owned or rail leased trailer which was licensed in a state other than California. Before foreign-licensed trailers, such as those cited in the Indictment, may be operated on the streets and highways of this state, California requires that the same must be registered and licensed in California (Vehicle Code §§6850, 6853) unless exempted by a reciprocity agreement with another state (Vehicle Code §§6852 and 8000(f)). Thus, the trailers cited in the 50 count Indictment could not legally leave the rail yard until they were registered and licensed in accordance with provisions of the Vehicle Code. This requirement was, in those instances, satisfied by the application of temporary 5-day permits costing $5.00, as authorized by Vehicle Code §§4004, 9260.

The mode of transportation with which we are here concerned was railroad trailer-on-flat-car (TOFC) service or "piggyback" service. It is nothing more than a hybrid form of transportation whereby a truck trailer is loaded at the origin by the shipper, moved over the highway to a railhead where it is loaded on a railroad flat car. Thereafter, the trailer moves from rail origin to rail destination where it is

removed from the flatcar. Finally, highway transportation is utilized to deliver the trailer to the ultimate destination for unloading.

There were four main variations of the TOFC, or piggyback mode of transportation in existence in 1975. The mode with which we are here concerned is referred to as *Plan IV* and was established and available pursuant to certain tariffs published and on file with the ICC. Plan IV is distinguished, in part, from the other variations by the requirement that the shipper must make arrangements for the drayman, that is, driver and tractor, for the over-the-highway transportation of the trailer at origin and destination. The pertinent tariff provisions were Item 6950 series and Item 1072 series.

Item 6950-A (introduced into evidence as Exhibit 60.1 at trial) Supplement 2 to Tariff 1-X and Item 1072 of Freight Tariff 1-X, both of which were in effect on July 15, 1975, are those commonly referred to as Plan IV TOFC, although that terminology is not to be found in the tariff. Item 6950-A (set forth in entirety as Exhibit E herein) named a charge of $1344.43 on "freight, all kinds, in trailers and/or containers on flat cars," subject to various notes and cross references, expressly including Note 2.

Note 2 in Item 6950-A states in part: "(B) Rate includes the loading of trailers or containers on flat car by a rail carrier's permanent facilities provided for such operation and the unloading of trailers or containers from flat cars by the rail carrier at rail carrier's permanent facility provided for such an operation." Thus, the $1344.43 charge constituted the line haul transportation charge for moving trailers from the origin railhead to the destination railhead. This aspect of the transportation is often referred to as the "ramp-to-ramp" segment of the transportation.

It is emphatically noted at this juncture that the movement of the trailer out of the railroad yard is not a part of Item 6950-A line haul transportation charge nor is the provision of flat cars or trailers a part of the line haul transportation charge. Note 2 to Item 6950-A states: "(A) (Subject to Item 1072) Flat cars, trailers in containers shall be furnished by the shipper or his agent. All such equipment shall be approved by the railroad." In other words, subject to Item 1072, the ramp-to-ramp charge is for transportation of *trailers provided by the shipper on flat cars provided by the shipper*.

Item 1072 (set forth in entirety as Exhibit F hereto) states in part 1, under the heading "Trailers Furnished by Carrier,": "Carriers are not obligated to furnish trailers. However, where trailers as specified in Note 4 of Item 6950 are furnished by the carriers, the following additional charges will be assessed for each trailer furnished and will apply for one-way rail movement, subject also to the detention charges and rules herein provided." An accessorial charge is named in Item 1072 for each closed trailer or container furnished by the railroad. This is commonly known as the trailer lease charge. It is separate from, *and in addition to*, the line haul transportation charge named in Item 6950-A.

Part 2 of Item 1072, under the heading "Flat Cars Furnished by Carrier", states, in effect, that when the carriers furnished the flat car, an additional charge of $49.53 will be made. This is commonly known as the flat car rental charge. It is also a separate and additional charge.

To summarize, there are three different tariff charges which could be assessed against a shipper for moving trailers in Plan IV TOFC service. One (Item 6950-A) is for the line haul rail transportation of the trailers and flat cars. The second (Part 1, Item 1072) is for the rental of the trailers from the railroad if the shipper does not have his own. The

third (Part 2, Item 1072) is for the rental of the flat car if the shipper elects to use a railroad flat car. The three separate charges for the three separate services is apparent from the reading of the two tariff items referred to hereinabove and was apparent from the freight bills admitted into evidence at trial.

All of the trailers involved in the fifty counts of the Indictment were rail owned or rail leased trailers which were provided to the shipper pursuant to Part 1, Item 1072 and for which a separate rental charge was assessed.

It was the practice of Santa Fe during 1975, the period covered by the Indictment, that when trailers, rail owned or rail leased but provided to the shipper pursuant to a rental charge, arrived in California and were made ready for truck transportation, Santa Fe provided the 5-day trip permits. However, when *trailers owned by the shipper* arrived in California in Plan IV service, it was the responsibility of the shipper to provide the 5-day trip permit. Naturally, if a shipper rented a rail owned or rail leased trailer bearing *permanent California license plates*, no temporary permit was required or furnished.

Effective July 6, 1976, Santa Fe amended its terminal tariff, not Item 1072, to include the following item which expressly referred to the purchase of permits for rail carrier furnished trailers:

> When a carrier furnishes a trailer or trailers to a shipper for transportation in accordance with published tariff provisions and ATSF [petitioner] receives a line haul as the origin and/or destination carrier, it will provide proper licensing of such trailer or trailers for highway transportation to and/or from ATSF ramp location in Arizona or California or New Mexico. Such licensing may be temporary or permanent at the option of the ATSF. When temporary licensing is used only one

> such license will be provided at origin and/or destination.

Santa Fe Tariff 8117-Y, ICC 15317, Supplement 23, Effective July 6, 1976; Item 763.

Said Amendment as required by ICC regulations, was marked with a "▲" which signified that it was a "change in wording which results in neither increase nor reduction in charges." It was duly filed and published in accordance with ICC procedure and without objection thereto.

The United States contended that it was the shipper's obligation to pay for the temporary license which was applied to the railroad's trailer. Conversely, Santa Fe contended that temporary license, necessary for movement of the trailer on California highways, was an obligation to be borne by Santa Fe for which it was reimbursed through the rental charge paid by the shipper for the use of the trailer. The pivotal determination was whether Santa Fe was providing the trip permits and bearing the cost of $5.00 per trailer, as an incident and obligation of the transportation service rendered or whether Santa Fe was assuming the cost of the $5.00 permit and knowingly conferring a concession upon the shipper.

When it became apparent that a finding of violation of the Elkins Act would revolve, in part, around an interpretation and construction of the tariff and practical usage attached thereto, Santa Fe timely moved the District Court for a stay of proceedings in the criminal prosecution pending referral to the ICC of the question of whether the tariff contemplated that a railroad trailer leased to the shipper pursuant to the trailer leasing charge in Item 1072, should be licensed by the railroad. This motion was premised upon the doctrine of primary jurisdiction and recited that it was within the exclusive province of the ICC to resolve the question of tariff interpretation and construction. Santa Fe's

motion was denied without oral argument and the District Court further denied Santa Fe's Motion for Reconsideration without allowing oral argument.

When the matter proceeded to trial without preliminary interpretation of the tariff by the ICC, Santa Fe proposed to present evidence through an independent witness who was an ICC practitioner of considerable experience in interstate commerce tariff interpretation and application, as well as through petitioner's employees who were instrumental in the drafting of the tariff and its practical application. The relevance of this testimony was premised primarily upon the fact that the tariff in question, Item 1072, *made no reference whatsoever to the problem of licensing or whose responsibility that was*. Santa Fe made a further offer of proof supported by applicable case authority, *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), to show the "usage of trade or locality" which attached provisions to the tariff not expressed in the language of the tariff. This usage of trade was that every transcontinental railway offering service under Plan IV to California and other states having temporary license requirements provided such licenses at railway expenses. Nevertheless, the District Court excluded all such evidence based on its conclusion that the tariff was not ambiguous and contained no "technical connotations".

During the course of the trial, the District Court concluded that the construction of the pertinent tariffs was a matter of law. However, at no time did the District Court actually interpret the tariff nor instruct the jury as to its interpretation of the tariff. Rather, the jury was provided with the tariffs which were introduced into evidence by the United States. Clearly, if interpretation of the tariffs was a matter of law, the failure to render any interpretation or construction of the tariffs was *a default* on the part of the District Court.

Similarly, Santa Fe, during the course of trial, made an offer of proof in support of evidence showing Santa Fe's good faith interpretation of the tariff. This was premised upon Santa Fe's intention to assert the defense of good faith as delineated in the decision of *Lehigh Coal & Nav. Co. v. United States*, 250 U.S. 556 (1919). The court sustained objections to such evidence and then, at the time of settling jury instructions, rejected Santa Fe's jury instructions pertinent to the defense of good faith interpretation.

After deliberation, the jury returned a verdict of guilty on 48 counts of violating the Elkins Act. Two counts had been dismissed by the District Court for technical inadequacies. Thereafter, the court entered judgment and imposed the following penalties: (1) fine of $5,000 per count on Counts 1 through 5 totaling $25,000; (2) fine of $20,000 per count on the remaining 43 counts for a total of $860,000, payment to be suspended during probation; and (3) probation for a period of three years on the terms that Santa Fe not violate any local, state or federal laws.

On appeal to the U.S. Court of Appeals for the Ninth Circuit, Santa Fe raised all of the issues stated above. In a three page Memorandum, included herein as Exhibit A, the Court of Appeals concluded that the question of construction of an interstate tariff is one of federal law and that where words of a tariff are used in an ordinary sense, preliminary resort to the ICC is unnecessary, citing *Great Northern Railway v. Merchants Elevator Company, supra*. The Court of Appeals also approved of the District Court's exclusion of the evidence pertaining to interpretation of the tariff on the grounds that there were no ambiguities or technical connotations in the language of the tariff. And, lastly, the District Court's refusal to admit evidence in support of the defendant's defense of good faith tariff interpretation was affirmed on the basis that violation of the Elkins Act,

being a *malum prohibitum* offense, did not require proof of evil intent as an element.

REASONS FOR GRANTING THE WRIT.

1. The Decisions of the Federal Courts Below in Refusing to Refer the Issue of Tariff Interpretation and Construction to the ICC Are in Conflict With the Decisions of This Court Regarding the Application of the Doctrine of Primary Jurisdiction of the ICC.

The special and important reason for granting the review of the lower court decisions is that the refusal of the District Court, affirmed by the Court of Appeals, to defer to the expertise and knowledge of the ICC in determining the issues of tariff interpretation and construction effectively nullifies the statutory purpose of the Commission, which is to decide issues of transportation policy and ensure uniform and expert administration of the regulatory scheme.

Although the province of the ICC has been discussed in several cases, the Court in *United States v. Western P. R. Co.*, 352 U.S. 59, 64 (1956), aptly observed that there is no fixed formula for applying the doctrine of primary jurisdiction of the ICC. However, that decision does identify and enunciate the two basic inquiries which must be made for determining whether a matter is within the exclusive and primary jurisdiction of the ICC. They are:

> [T]he first question presented is whether effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here; this, in turn, depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act.

352 U.S. at 65.

As should be abundantly clear from the statement of the case, the answers to the aforequoted inquiries when applied

to the case at bar must be in the affirmative. The issue of licensing piggyback trailers, and at whose expense, is manifestly one of transportation policy. During the year in which the transactions cited in the 50 counts occurred, Santa Fe engaged in some 128,000 similar piggyback transactions. The magnitude of this number is enhanced considerably by the realization that at least three other major transcontinental railroads were providing piggyback service to West Coast states requiring temporary licenses. It was the practice among the railroads that the cost of temporary licenses was borne by the rail carrier on rail-owned or rail-leased trailers. There can be no question that such licensing was an issue of industry-wide significance and effect.

Similarly, it is apparent that the resolution of the question of licensing of out of state trailers, the responsibility for which is not expressly assigned within the applicable tariffs, is, *a fortiori*, a matter which cannot be evaluated by a district court or an appellate court in a vacuum of facts. Certainly such an interpretation requires a presentation of evidence, possibly conflicting and voluminous, which would require an acquaintance with transportation concepts and policy in order to adequately appreciate the ramifications thereof. The absence of such evidence or the inability to appreciate such evidence if it were presented, would obviously create the opportunity for a lack of uniformity and for inexpert administration of the regulatory scheme. This is graphically exemplified by two observations: (1) Both the Court of Appeals (page 2 of the Appendix) and the District Court (page 6 of the Appendix) thought the 5-day permits were applied to *customer-owned or provided trailers*, and (2) Santa Fe was found guilty of violating the Elkins Act for following a practical adaptation to the Plan IV tariffs — a usage which was adopted by every other transcontinental railroad con-

fronting the necessity for temporary licensing of foreign trailers.

The Court in *United States v. Western P. R. Co., supra,* observed that:

> [W]here the question is simply one of construction the courts may pass on it as an issue 'solely of law.' But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff-application must first go to the Commission. The reason is plainly set forth: such a 'determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.'

352 U.S. at 65-66 (Citing *Great Northern R. Co. v. Merchants Elevator Co.* 259 U.S. 285 at 291 (1922)).

It is respectfully submitted that the issue of tariff construction and application relevant to the licensing of trailers, by reason of the absence of tariff language and the potential for inexpert and non-uniform administration of the transportation mode, was within the exclusive primary jurisdiction of the Interstate Commerce Commission.

While the aforestated lack of uniformity and expert and consistent administration is readily apparent to Santa Fe, it may not be so apparent to the Court without a complete review of the record in this case. In this regard, this Court in *Great Northern R. Co. v. Merchants Elevator Co., supra,* while delineating the nice distinctions between whether a question of tariff construction was a matter within the jurisdiction of the district court or the ICC, also gave assur-

ances to litigants, such as Santa Fe, that there is a safeguard against the district court's improper construction of the tariff. That opinion assuages our concern by the following language:

> If the parties properly preserve their rights, a construction given by any court, whether it be Federal or state, may ultimately be reviewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured.

259 U.S. 290-91.

Such is the case at bar. The District Court affirmed by the Court of Appeals for the Ninth Circuit based upon *Great Northern R. Co. v. Merchants Elevator Co.*, did proceed with its own construction of the tariff. Now, Santa Fe, aggrieved by that construction, but having preserved the record, wishes to have this Court review the record on Writ of Certiorari to ascertain whether an expert and uniform construction of the tariff was accorded Santa Fe.

2. The Decisions of the Lower Courts to Exclude Evidence of Tariff Interpretation Showing Usage of Trade or Locality Are in Conflict With the Applicable Decision of This Court as Well as Other Federal Courts.

The District Court held that Santa Fe's evidence interpreting the tariff on the basis of trade usage and its technical meaning to railroads was inadmissible. The reason for this ruling was that the court could find "no colorable ambiguities or technical connotations" in the tariff and, therefore, to admit the evidence would intrude on the province of the jury. Exhibit C, p. 14. The Court of Appeals affirmed, stating that because there were no ambiguities or technical connotations the interpretation of the tariff was a matter of law. Exhibit A, p. 3.

These rulings ignore the opinion of this Court in *Great Northern R. Co. v. Merchants Elevator Co., supra*, in which the Court stated:

> [W]ords are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. *Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument.*

259 U.S. at 291-92 (Emphasis added.)

The extrinsic evidence offered by Santa Fe clearly established that a "usage of trade" had the railroads bearing the expense of the temporary license requirements of certain states, including California. Such evidence clearly demonstrated that railroads and shippers had attached a "peculiar meaning" to the tariff in spite of the fact that it, the tariff, may have appeared non-technical to the District Court. Manifestly, the exclusion of this evidence was error and prejudicial to Santa Fe.

This excluded evidence shows that the tariff is subject to more than one interpretation and the general rules of construing writings must be used to determine which interpretation is proper. The courts below failed to properly apply these well established rules which support the interpretation given the tariff by Santa Fe.

Both the District Court and Court of Appeals cite *Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338 (8th Cir. 1971), which gives a summary of the applicable rules. But the courts failed to even mention the rule most applicable to the present case:

> [A] strict construction of a tariff against a carrier is not justified where such a construction ignores a permis-

> sible and reasonable construction which conforms to the intentions of the framers of the tariff, *avoids possible violations of the law*, and accords with the practical application given by shippers and carriers alike.

439 F.2d at 1341 (Emphasis added).

The courts below have ignored the evidence supporting the reasonable and widely accepted interpretation of the statute and have given it an interpretation which has resulted in the criminal conviction of Santa Fe. By doing so, they have completely ignored the rule above and, therefore, misapplied the *Penn Central* case.

In a case in which it was called upon to interpret the language of a tariff, this Court has applied the rule that "where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law." *Great Northern R. Co. v. Delmar Co.*, 283 U.S. 686, 691 (1931).

The District Court, having decided that the tariff language was not subject to ICC interpretation, then excluded Santa Fe's extrinsic evidence as to the proper interpretation of the tariff. By ignoring and misapplying the rules of tariff interpretation, the District Court reached an interpretation which resulted in Santa Fe's conviction. The Court of Appeals affirmed with virtually no discussion. Such rulings by the lower courts are diametrically opposed to applicable rulings of this Court and must, therefore, be reviewed pursuant to Writ of Certiorari.

3. The Lower Courts Decided the Issues of the Relevance of Good Faith Tariff Interpretation and the Applicability of a Defense Based Thereon in Direct Conflict With the Decision of This Court in *Lehigh Coal & Nav. Co. v. United States*, 250 U.S. 556 (1919).

At the commencement of the trial, counsel for Santa Fe apprised the District Court of Santa Fe's intention to assert the defense of good faith tariff interpretation premised upon the decision of *Lehigh Coal & Nav. Co. v. United States, supra*. At an appropriate time, while making an offer of proof in support of its case in chief, counsel for Santa Fe inquired whether the court's previous rulings precluded testimony relative to the defense that Santa Fe's interpretation of the subject tariffs was rendered in good faith. After the court's preliminary remarks, Santa Fe made a substantial and explicit offer of proof as to proposed testimony of that issue. Nonetheless, the court sustained the government's objection as to the entirety of such testimony. Similarly, while settling the jury instructions after the taking of evidence had been completed, Santa Fe presented proposed instructions as to the defense of good faith tariff interpretation premised upon the *Lehigh Coal* opinion. The government serially objected to said instructions and the court sustained said objections.

In its Memorandum of Decision, the Court of Appeals for the Ninth Circuit, in affirming the District Court, concluded that violation of the Elkins Act, being a *malum prohibitum*, rather than a *malum in se* offense, did not require proof of evil intent as an element of the charge, citing *Armour Packing v. United States*, 209 U.S. 56, 69-72 (1908); *Union Petroleum Corp. v. United States*, 376 F.2d 569, 573 (10th Cir.), *cert. denied* 389 U.S. 838 (1967).

The action of the District Court and the Court of Appeal in regard to the defense of good faith interpretation of the tariff was in direct contravention of the precepts enunciated in *Lehigh Coal & Nav. Co. v. United States, supra.*

At trial on prosecution for violation of the Elkins Act, Lehigh presented evidence to support its defense that, although cognizant of the tariff allowance accepted, it had not "knowingly" accepted a rebate within the meaning of the Elkins Act because it had acted in good faith and in the honest belief that it was complying with the tariff. At the close of trial, the trial court concluded that Lehigh's honest belief that the allowance was permitted by the tariff was no defense since (1) Lehigh knew the contents of the tariffs and (2) the allowance was actually received by Lehigh. As a consequence, the trial court struck such evidence and refused to submit the question of good faith tariff interpretation to the jury on the holding that the defendant could not assert the defense of good faith and honest belief because it [Lehigh] "knew the contents of the tariffs, and knew also that the allowance was actually made and received." 250 U.S. at 562.

On a review pursuant to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, this Court held that the defendant had the right to show that the allowance was received in honest belief and that in receiving it, defendant was not disregarding what it believed to be the provision of the tariff. Implicit in this holding was that the district court further erred in refusing to submit the question of good faith to the jury. It was observed that:

> The misunderstanding was induced by practice and the opinion of those of authority that the act was complied with; and the word 'knowingly', therefore, as we have already indicated, must be considered and given exculpating effect if error there was.

250 U.S. at 566.

It is true that in the *Lehigh Coal* case, defendant was a shipper rather than the carrier. It is also true that there the defendant was not responsible for drafting the tariff whereas here, petitioner Santa Fe participated with other transcontinental railroads in the drafting of said framework. However, none of those differences serve to abrogate the exculpatory effect of the word "knowingly" in the Elkins Act language as established in the *Lehigh Coal* case.

The Court of Appeals, refusing to apply *Lehigh Coal*, relied on the only case to cite the *Lehigh Coal* opinion — *Union Petroleum Corp. v. U.S., supra*. But the appellate court in *Union Petroleum* failed to distinguish *Lehigh Coal* and certainly could not overrule it. That court, as did the appellate court in the present case, rejected *Lehigh Coal* in favor of *Armour Packing Co. v. U.S., supra*, which was decided *prior* to *Lehigh Coal* and prior to the insertion of the word "knowingly" in the Elkins Act.

This Court has never expressly overruled the *Lehigh Coal* opinion, nor can it be said to have been overruled *sub silentio*. The District Court sees support for its holding in *Union Pacific R. Co. v. U.S.*, 313 U.S. 450 (1941), and *U.S. v. Braverman*, 373 U.S. 405 (1963), but neither of these cases involved tariff interpretation. Thus, *Lehigh Coal* remains the most recent statement of this Court on the application of the Elkins Act where the defendant's "crime" was following a good faith interpretation of a tariff. As such, it was error for the District Court to exclude Santa Fe's evidence of good faith interpretation of the tariff and to refuse to instruct the jury on the defense of good faith interpretation. The Court of Appeals erred in ignoring *Lehigh Coal* and affirming the judgment of the District Court.

Conclusion.

The seriousness of any criminal prosecution should require the courts to fairly apply the controlling law. The courts below have misapplied and ignored the controlling decisions of this Court. In order that justice be afforded the Santa Fe and that the decisions of this Court be properly followed, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

EXHIBIT A.

Memorandum

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, v. The Atchison, Topeka and Santa Fe Railway Company, Appellant. No. 80-1106.

Appeal from the United States District Court for the Central District of California.

Before: PREGERSON, NELSON, Circuit Judges and TURRENTINE,* District Judge.

Filed: Oct. 10, 1980.

On May 21, 1979, defendant The Atchison, Topeka and Santa Fe Railway Company, a corporate common carrier, was indicted for fifty violations of the Elkins Act, 49 U.S.C. § 41(1). The indictment charged that defendant "knowingly offered and granted concessions" which "caused property to be transported at a rate less than that named in the tariffs published and filed by defendant . . . with the Interstate Commerce Commission." On January 17, 1980, defendant was found guilty on all but two of the fifty counts.

The evidence established that throughout 1975 defendant railroad furnished State of California Department of Motor Vehicles trip permits to its customers. Trip permits are short-term licenses for operation of vehicles beyond the railroad ramp area (i.e., on highways) for a five day period. These $5.00 permits are required under California law for truck trailers not permanently registered in California. Defendant provided the permits without separate charge to its shipper-customers for traffic moving under a "Plan IV" tariff. "Plan IV" transportation is a type of trailer-on-flat-car

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*The Hon. Howard B. Turrentine, District Judge for the Southern District of California, sitting by designation.

(TOFC) service in which the railroad receives customer-owned or leased truck trailers at the point of origin ramp and places the trailers on railroad flatcars for transportation to the destination, where the trailers are unloaded into the ramp area. The customers then pick up the trailers, attach them to tractors, and move them onto the highway for transportation to the final destination. Under "Plan IV" the defendant's responsibility ends at the ramp area.

Defendant amended its tariff on July 6, 1976 to specifically permit defendant to pay for the permits on behalf of its shippers. There is no dispute that prior to this date defendant paid for the permits in the instances for which it was convicted, as well as on hundreds of thousands of other occasions.

The Elkins Act imposes criminal liability on carriers which fail to strictly adhere to the terms of the applicable published tariffs. The Act expressly prohibits carriers from granting, and shippers or their agents from receiving, concessions which deviate from the published rates. 49 U.S.C. § 41(1). There is also a conclusive presumption that any deviation from the tariff rate filed with the ICC constitutes a criminal violation of the Act. 49 U.S.C. § 41(1).

The defendant contends that the trial court committed prejudicial error for the following reasons:

1. The court failed to grant defendant's motion to stay proceedings and refer the matter to the ICC for resolution.

2. The court improperly excluded evidence regarding construction of the tariff.

3. The court ruled construction of the tariff was a matter of law.

4. The court failed to properly instruct the jury on the question of tariff interpretation.

5. The court did not permit defendant to prove that its interpretation of the tariff was in good faith.

Defendant contends the permit issue is within the primary jurisdiction of the ICC because of the necessity for uniformity in tariff interpretation, and that the Commission should be required by court order to consider the question before a criminal prosecution may commence. The question of the construction of an interstate tariff is one of federal law. Where words are used in their ordinary sense preliminary resort to the ICC is unnecessary. *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 290 (1922).

At trial the defendant offered expert testimony for the purpose of interpreting the tariff to mean that the permit fees were included. In excluding the tendered evidence the court correctly held that the interpretation of the tariff was a matter of law and that there were "no colorable ambiguities or technical connotations in the language of the tariff." *See Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1340-41 (8th Cir. 1971).

The trial court refused to admit evidence in support of defendant's defense of good faith tariff interpretation. It is clear that the Elkins Act created a malum prohibitum rather than a malum in se offense. Proof of evil intent is not an element of a charge under the Elkins Act. *Armour Packing Co. v. United States*, 209 U.S. 56, 69-72 (1908); *Union Petroleum Corp. v. United States*, 376 F.2d 569, 573 (10th Cir.), *cert. denied*, 389 U.S. 838 (1967).

The judgment below is affirmed.

EXHIBIT B.
Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, vs. The Atchison, Topeka and Santa Fe Railway Company, Appellant. No. 80-1106.

Before: PREGERSON and NELSON, Circuit Judges and TURRENTINE,* District Judge.

Filed: Jan. 26, 1981.

Appellant's petition for rehearing is denied.

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*The Hon. Howard B. Turrentine, District Judge for the Southern District of California, sitting by designation.

EXHIBIT C.

Memorandum of Decision and Order.

United States District Court, Central District of California.

United States of America, Plaintiff, v. The Atchison, Topeka & Santa Fe Railway Co., a corporation, Defendant. No. CR 79-437-RJK.

Filed: Mar. 12, 1980.

The Court has before it three motions filed by defendant: *Motion for Arrest of Judgment, Motion for Judgment of Acquittal, and Motion for a New Trial.* Each motion is directed to a guilty verdict, after trial of defendant, on forty-eight counts charging violations of the Elkins Act, 49 U.S.C. § 41(1). These motions present essentially two issues for consideration by the Court: first, whether the Court may properly upset a guilty verdict in a criminal prosecution for tariff violations where, upon applying the terms of the relevant tariff to the behavior in question, the jury made the factual determination that defendant's payment of certain license fess for trailers shipped on its cars constituted a "concession" within the meaning of the Elkins Act, causing property to be transported by defendant at a rate less than that stated in the governing tariff; second, whether good faith or lack of evil intent are defenses to a *malum prohibitum* crime such as this.

I. *Statement of Facts.*

On May 21, 1979, defendant The Atchison, Topeka and Santa Fe Railway Company, a corporate common carrier, was indicted for fifty violations of the Elkins Act, 49 U.S.C. § 41(1). The indictment charged that defendant "knowingly offered and granted concessions" which "caused property to be transported at a rate less than that named in the tariffs

published and filed by defendant THE ATCHESON [sic], TOPEKA AND SANTA FE RAILWAY COMPANY with the Interstate Commerce Commission." On January 17, 1980, defendant was found guilty on Counts 1 through 21, 23 through 29, and 31 through 50 of the indictment.

The evidence established that throughout 1975 defendant railroad furnished State of California Department of Motor Vehicles trip permits, i.e., short-term licenses for operation of vehicles, free of charge to defendant's shipper-customers for traffic moving under a "Plan IV" tariff. "Plan IV" transportation is a type of trailer-on-flat-car (TOFC) service in which the railroad receives customer-owned or -leased truck trailers at the point of origin ramp and places the trailers on railroad flatcars for transportation to the destination, where the trailers are unloaded into the ramp area. The customers then pick up the trailers at the ramp area, attach them to tractors, and move them onto the highway for transportation to the final destination. The Plan specifically provided that defendant would only move the trailers to its railyard; defendant was not responsible for the transportation of the trailer from its yard to the final destination. Under California law, unless the trailer is permanently registered in California, a Department of Motor Vehicles permit is required for any movement of the trailer beyond the ramp area. The so-called "trip permits" in question here were in the amount of $5.00 per trailer, permitting highway operation for a five day period.

Defendant has never disputed the fact that it paid the $5.00 trip permit charge on behalf of its shippers in the forty-eight instances for which it was convicted, as well as in the hundreds of thousands of other instances in which it shipped trailers on its flatcars before July 6, 1976 when apparently in recognition of a prior omission in its tariff, defendant amended its tariff to specifically permit defendant

to pay for such permits. The tariff relevant to this prosecution is published by the Transcontinental Freight Bureau, to which defendant is a party. The tariff, whose applicability defendant does not dispute, defines the service to be rendered by defendant railroad as ramp-to-ramp transportation, and it contains no provision permitting defendant to furnish the trip permits:

> "Rate includes the loading of trailers or containers on the flat car by the rail carrier at rail carrier's permanent facilities provided for such operations and the unloading of trailers or containers from the flat car by the rail carrier at rail carrier's permanent facilities provided for such operations (does not include facilities for interchange with common or charter carriers of any type)."
>
> TCFB Tariff I-X, ICC 1912, Effective July 15, 1975, Item 6950, Note 2(B).

Effective July 6, 1976, defendant amended its tariff to include the following item which expressly authorizes defendant to purchase permits on behalf of shippers:

> "When a carrier furnishes a trailer or trailers to a shipper for transportation in accordance with published tariff provisions and ATSF [defendant] receives a line haul as the origin and/or destination carrier, it will provide proper licensing of such trailer or trailers for highway transportation to and/or from ATSF ramp location in Arizona or California or New Mexico. Such licensing may be temporary or permanent at the option of the ATSF. When temporary licensing is used only one such license will be provided at origin and/or destination."
>
> Santa Fe Tariff 8117-Y, ICC 15317, Supplement 23, Effective July 6, 1976; Item 763.

Defendant was convicted here of acts committed in 1975 when the earlier tariff was in effect.

II. *Applicable Criminal Statute.*

The Elkins Act, 49 U.S.C. § 41(1), imposes criminal liability on carriers which fail to strictly adhere to the terms of the applicable published tariffs. The act expressly prohibits carriers from granting, and shippers or their agents from receiving, concessions which deviate from the published rates:

> "The willful failure upon the part of any carrier subject to [the Interstate Commerce Act] to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,00 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act. . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carriers, as is required by said Act . . . or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concessions, or discrimination shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000. . . ."

The Elkins Act also creates a conclusive presumption that any deviation from the tariff rate filed with the Interstate Commerce Commission constitutes a criminal violation of the Act:

> "Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the [Interstate Commerce] Act . . . or participates in any rates so filed or published, that rate as against such such carrier, its officers or agents, in any prosecution begun under sections 41, 42 or 43 of this title shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed an offense under this section." 49 U.S.C. § 41(2).

As the U.S. Supreme Court commented on 49 U.S.C. § 41(1) in *United States v. Braverman*, 373 U.S. 405, 406, 83 S.Ct. 1370, 1371 (1963): "More unequivocal language would be hard to imagine. It strikes at *any and every kind of rebate*, no matter by whom or to whom given." (emphasis supplied) In reviewing the legislative history of the Elkins Act, the *Braverman* court noted that the House Committee on Interstate and Foreign Commerce, in its favorable report on the bill which became the Elkins Act, observed that "it was 'practically impossible to show the discrimination' and recommended passage of its proposal making it 'a penal offense to make any departure from the published rates whether there be a discrimination or not.' [citation omitted]" 373 U.S. at 407, 83 S.Ct. at 1372. The *Braverman* court then analyzed the philosophy underlying the Elkins Act:

> "We have considered the statute before us in light of the salutary rule that criminal statutes should not by interpretation be expanded beyond their plain language. [citation omitted] But neither can we interpret a statute so narrowly as to defeat its obvious intent. [citation omitted] Congress, the [Interstate Commerce] Commission, and the public were so concerned to make certain that, once a tariff had been published, *no deviations whatever* from that tariff would take place.

> *Nowhere can we find support for the suggestion that some departures were to be checked while others were to be allowed.* We would ignore the express language of the Elkins Act, the economic ills which gave rise to its passage, the objects which the framers of the statute had in mind, and the subsequent judicial enforcement of the Act if we limited its operation to only some kinds of rebates or to only some people. *Congress wanted rates to be published and honored. It wanted rebates stopped.* It used fitting language to accomplish that end." 373 U.S. at 408-409, 83 S.Ct. at 1372. [emphasis supplied]

Accordingly, *Braverman* broadly construed the Elkins Act to hold that an offense was stated where the indictment charges that a person has solicited a rebate from a common carrier regarding the transportation in interstate commerce of a shipper's property, even though it is not alleged that the rebate was for the benefit of the shipper. The advertised and proffered preference in our case is within the rule announced in *Braverman*.

III. *Motion for a New Trial.*

Defendant predicates its motion for a new trial on the following grounds: that the Court erred in excluding expert testimony by defense witnesses regarding proper interpretation and application of the relevant tariff; that the Court erred in charging the jury as to the definition of a "concession" and as to the proper guidelines for tariff interpretation and in refusing to charge the jury regarding a defense of good faith interpretation of the applicable tariff; that the verdict was contrary to the weight of the evidence and was unsupported by substantial evidence; and finally, that the Court erred in refusing to stay these criminal proceedings pending referral of the tariff interpretation issues to the Interstate Commerce Commission.

As to defendant's first argument — that the Court erred in barring defense evidence regarding the proper interpretation and application of the tariff in question — no cases have been cited by either party which interpret the language of the tariff in question. However, certain well-established rules of tariff construction have been generally adhered to be [sic] the courts. In *Penn Central Company v. General Mills, Inc.*, 439 F.2d 1338, 1340-1341 (8th Cir. 1971), the Eighth Circuit discusses a number of appropriate guidelines and the established authority from which they arise. First, where no issue of fact is present and the words of the tariff are used in their ordinary meaning with no particular connotation within the field of expertise of the Interstate Commerce Commission, then the interpretation of a tariff ordinarily presents a question of law. Second, a tariff is no different from any other type of contract, and hence its true application must sometimes be determined by the factual context upon which it is to be impressed. Third, in the interpretation of a tariff, the words of the tariff must be construed in accordance with their generally-accepted usage and meaning. Fourth, the tariff should be strictly construed against the carrier since it is the carrier who drafted the tariff; accordingly, any doubt or ambiguity should be resolved against the carrier. Fifth, such ambiguity or doubt must be a substantial and reasonable one and should not be the product of an undue straining of the tariff's language. Sixth, published rules relating to tariffs must have a reasonable construction and should be interpreted in such a way as to avoid unfair, unusual, absurd, or improbable results.

As to defendant's claim that extrinsic evidence was necessary to guide the jury's interpretation and application of the tariff here, the crucial question is whether, in light of the well-recognized rules of tariff interpretation discussed

above, the relevant tariff (TCFB Tariff I-X, ICC 1912, Effective July, 1975) contains words which are used in their ordinary meaning — as opposed to a technical connotation elusive to the average person — or otherwise contains significant ambiguities regarding the responsibility of defendant railroad to provide trip permits free of charge to shippers as part of its basic rail transportation service.

The tariff clearly states that the transportation service offered by defendant railroad is on a "ramp-to-ramp" basis, with the responsibility for transportation of the trailers beyond the ramp area resting with the shipper or its agent. As the government notes, to imply otherwise — that is, to imply from the tariff a duty to perform an addition or service or pay for a post-ramp necessity (the permit) not explicitly called for by the tariff's express terms — would be to place a strained, unnatural construction on the tariff. Rather than attempting to delineate all possible permissible and impermissible kinds of services to be offered by the railroad, the tariff delineates the railroad's obligations on a "geographic" basis: the tariff describes the physical point at which the railroad's duties of service begin (the ramp at the place of origin of the shipment) and the point at which the duty of service ends (the ramp at the place of destination). In essence, then, there are three stages in the transportation process here: shipment of the cargo on the highway for delivery at the ramp area of defendant railroad; shipment of the trailer on the flat cars; and transportation of the trailer from the railroad ramp area to the ultimate destination, again on the highway.

On the basis of this rather simple geographic delineation of defendant railroad's duty of transportation service provided in the applicable tariff, the jury could quite readily conclude that the trip permits related to the last leg of the trailer's transportation when it was attached to a tractor and

driven on the highway. As the *Braverman* court noted, the Elkins Act unequivocally bars *any* deviation from the published rate; any such deviation is conclusively presumed to constitute a criminal violation. The confines of permissible transportation service under the geographic model employed in the tariff here are set forth in an equally simple fashion. By providing free of charge an additional, non-rail-transportation service affecting the highway leg of the transportation process, defendant railroad effectively transported the trailers for an amount less than the published, legal tariff rate. In an analogous case involving the furnishing of warehouse services by a railroad, *Baltimore & O. R. Co. et al. v. United States et al.*, 305 U.S. 507, 523-524, 59 S.Ct. 284, 290 (1939), the U.S. Supreme Court noted:

> "... a saving on the non-transportation services obviously figures out the same as a rebate on the transportation service. It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6(7) of the [Interstate Commerce] Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device any portion of the rates.' When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated."

In the case at hand, defendant Santa Fe provided an additional non-rail-transportation service free of charge by paying the shipper's license fees in California.

In short, then, a side-by-side comparison of the language of the governing tariff with the description of the illegal acts — defendant railroad's payment of the $5.00 trip permit license fee — simply points up no colorable ambiguities or technical connotations in the language of the tariff. Accordingly, acceptance into evidence of expert and lay opin-

ion testimony regarding the appropriate interpretation and application of the tariff would have constituted an unwarranted intrusion into the province of the jury in its application of the governing tariff to the factual context at hand.

Defendant Santa Fe further asserts that it did not *knowingly* grant a concession to its shipper-customers, thereby causing property to be transported at a rate less than the published, lawful tariff rate, in violation of the Elkins Act. Accordingly, defendant asserts that the Court erred in failing to instruct the jury on a defense of good faith interpretation of the relevant tariff; defendant further asserts that the record is absolutely devoid of evidence that defendant "knowingly" granted a concession in violation of the statute. Defendant's position essentially is that a good faith interpretation, or even misinterpretation, of the tariff is a defense to an Elkins Act prosecution.

Defendant relies primarily upon *Lehigh Coal & Navigation Co. v. United States*, 250 U.S. 556, 40 S.Ct. 24, 63 L.Ed. 1138 (1919) which, according to defendant, overturned the conviction of a defendant for an Elkins Act violation because the trial court had refused to permit defendant therein to present evidence of its good faith interpretation of the applicable tariff. However, *Lehigh Coal* is clearly distinguishable from the case at hand. In *Lehigh Coal*, the defendant had taken certain actions in reliance upon the sanction of the Interstate Commerce Commission that such behavior comported with the applicable tariff. As the Court held: "The misunderstanding was induced by practice and the opinion of those in authority that the act was complied with and the word 'knowingly' therefore, as we have already indicated, must be considered and given exculpatory effect if error there was." 250 U.S. at 566, 40 S.Ct. at 26. In the case at hand, the Interstate Commerce Commission did not sanction defendant's payment of the trip permits, but indeed

an ICC representative, on several occasions before the tariff was amended, informed defendant that its actions were improper and in likely violation of the Elkins Act. In addition, *Lehigh Coal* involved prosecution of a shipper for acceptance of concessions, whereas here defendant carrier drafted the tariff and is, correspondingly, held to a higher standard of knowledge of it.

The government relies upon *Armour Packing Co. v. United States,* 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681 (1907), which held that: "The stipulated facts show that the shippers had knowledge of the rates published, and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required." 209 U.S. at 86, 28 S.Ct. at 437. Although *Armour* was decided prior to the insertion of the term "knowingly" into the Elkins Act, the Court here agrees with the view of the Tenth Circuit regarding this change in the Elkins Act, as expressed in *Union Petroleum Corporation v. United States,* 376 F.2d 569, 573 (10th Cir. 19679), *cert. denied,* 389 U.S. 838 (1967): "We do not think that this amendment alters the fundamental principle that one's mistaken understanding of the law does not constitute a defense. [citations omitted]. Furthermore, the term 'knowingly' imports merely perception of the facts necessary to bring the questioned activity within the prohibition of the statute. The term does not require as a part of its meaning that there necessarily be knowledge or awareness that such activity is in fact prohibited. [citation omitted]." The Fourth Circuit voiced a similar view in *Powell v. United States,* 112 F.2d 764, 767 (4th Cir. 1940), which upheld an Elkins Act conviction: "In any event, the charging of a lower rate than the one properly applicable was wilful within the meaning of the statute, in that it was the intentional doing of an act which the statute forbade. It is well-settled that the use in the act

of the word 'wilful' does not require that there be an evil intent to commit the offense, but that it is sufficient if the act was done knowingly."

This standard finds support in *Union Pac. R. Co. v. United States*, 313 U.S. 456, 61 S.Ct. 1064 (1941), which involved an Elkins Act prosecution and was decided after *Armour, Lehigh Coal*, and the 1906 amendment inserting "knowingly" into the Elkins Act. In *Union Pac. R. Co.*, the U.S. Supreme Court reiterated the well-established view that: "Violations of the commerce acts through receipt of advantages is to be tested by *actual results not by intention*. [citation omitted] *Any and all means to accomplish the prohibited end are banned*. [Citation omitted]." 313 U.S. at 462, 61 S.Ct. at 1071 [emphasis supplied]." Good faith interpretation or misinterpretation not being a defense to prosecution for violation of the Elkins Act, there was no error in refusing to charge the jury as to such a defense.

In addition, the Court finds that the government met its burden of proving the "knowledge" element of an Elkins Act violation. In both its motion for new trial and judgment of acquittal, defendant argues that the government failed to sustain its burden on this issue. In *Continental Shippers' Association v. United States*, 328 F.2d 966 (9th Cir. 1964), the Ninth Circuit stated that in reviewing a conviction under the Elkins Act, the reviewing court views the record in the light most favorable to the government. *See also Bolen v. United States*, 303 F.2d 870, 874 (9th Cir. 1962) ("While there is some conflict in the testimony, we must view the evidence in the light most favorable to the Government, including the reasonable inferences to be drawn therefrom. [citation omitted] If, viewed in this light, there is substantial evidence to support the jury's verdict, it must be sustained. [citation omitted].")

Applying the standard that the knowledge requirement in the Elkins Act merely refers to defendant's awareness of such facts as to enable it to charge the lawful rate, the evidence proffered by the government establishes that defendant had knowledge of sufficient facts to enable it to adhere to the terms of the tariff. The government offered into evidence defendant's trailer receipt contract which provides that the receiver of the trailer, and not defendant, shall pay for all state licenses. In addition, the government proffered internal correspondence between defendant's employees directing that payment of the trip permit fees be made on behalf of defendant's customers; defendant's employees then testified that, in accordance with these company orders, the trip permit fees were in fact paid. Having drafted the tariff, defendant carrier knew that its obligations for transportation service were defined on a ramp-to-ramp basis, with its responsibilities ending with the unloading of the trailer into the ramp area. Accordingly, in the absence of any evidence to the contrary, the jury was entitled to draw the reasonable inference that in 1975 defendant had sufficient perception of those facts necessary to bring the questioned activity within the prohibition of the Elkins Act — that is, the intentional doing of an act which the statute forbade; knowledge that the activity was prohibited was not necessary. Under the *Union Pac. R. Co.* standard, the actual result achieved was transportation of the trailers at a rate less than the published tariff rate, and hence sufficient evidence is present to sustain the conviction for the "knowing" grant of a concession.

As an additional ground in its motion for a new trial, defendant contends that the Court improperly charged the jury as to the proper definition of a "concession" when the Court charged the jury as follows: "A concession is granted if the shipper obtains any advantage not provided for by

tariff.'' Defendant contends that the instruction is misleading in the sense that it focuses on ''any advantage,'' as opposed to equating the concession with ''receipt of transportation at less than the tariff rate.'' This argument is unconvincing. As noted above, *Braverman* prohibits *any* deviation from the published tariff rate and broadly construes the terms employed in the Elkins Act. Furthermore, the government points out that defendant's argument ignores the many references contained in other instructions given to the jury, which restated the requirement that defendant be found to have transported property at a rate less than that in the published tariff.

Finally, defendant contends that the Court should have stayed these criminal proceedings and referred the matter to the appropriate administrative agency, the Interstate Commerce Commission, for resolution. This argument is also unconvincing. Obviously in creating original jurisdiction in the federal courts to hear actions charging criminal violations of the Elkins Act, the Congress was well aware of the division of responsibility and expertise between the federal judiciary and the Interstate Commerce Commission. In so doing, Congress was equally aware of the fact that juries would be asked to apply the relevant tariff to the activity alleged to constitute a violation of the Elkins Act and to thereby determine whether criminal liability was present.

IV. *Motion for Judgment of Acquittal.*

In support of this motion, defendant raises a number of arguments: that the government failed to show that defendant's activities resulted in any kind of discriminatory treatment of shippers; that the government failed to prove that the cost of the trip permits was not implicitly included in the tariff charge assessed for rental of the trailers; and that

the government failed to show that defendant "knowingly" granted a concession in violation of the Elkins Act.

In *Braverman, supra,* the U.S. Supreme Court was quite explicit in holding that the gist of an Elkins Act violation lies in the *departure* from the published, lawful tariff rate. The Court reviewed the legislative history of the Act wherein the drafters indicated their intent to create " 'a penal offense to make any departure from the published rates whether there be a discrimination or not.' " 373 U.S. at 407, 83 S.Ct. at 1372. Thus, defendant's argument as to discriminatory treatment falls before established authority. Defendant's second argument in support of its motion is also unpersuasive: that the government failed to sustain the burden of proving that the tariff charge assessed for the rental of trailers under Plan IV did not provide implicitly for defendant's purchase of trip permits on behalf of its shipper-customers. The construction of the applicable tariff has been discussed at length above. The Court found the tariff to be clear upon its face. A jury could readily conclude that the activity in question was clearly barred by the ramp-to-ramp concept of service enunciated in the tariff, that defendant was providing a non-rail-transportation service free of charge, and hence that defendant was engaging in rail transportation service at a rate less than the lawful rate. Finally, as also discussed above, the jury could reasonably conclude that the government sustained its burden of proving that defendant knowingly committed an act which constituted a concession prohibited by the Act.

V. *Motion for Arrest of Judgment.*

Defendant predicates this motion upon the following grounds: that the indictment fails to state an offense in Counts 1, 7, 21, 24, 26, 36, and 37 in that the indictment fails to identify the person receiving the concession; that the

indictment alleging that defendant's concessions caused property to be transported at a rate less than that named in the tariff does not state an offense committed by defendant; and that prosecution under a criminal statute which affords no notice of criminally-proscribed conduct violates defendant's right to due process of law.

In its first argument, defendant contends that certain counts of the indictment are flawed in that the counts list the "receiver/consignee" as the party receiving the concession, as opposed to the actual shipper itself. This contention is without force. The Elkins Act itself refers to agents of a shipper, as well as the shipper itself. Additionally, the offense at which the indictment is directed is the *grant* of concessions by a carrier. *Braverman, supra,* broadly interpreted the kinds of parties who may be drawn within the Elkins Act in holding that an offense under the Act is stated when the indictment charges that a person has solicited a rebate from a common carrier regarding interstate shipments, *even though the indictment does not allege that the rebate was for the benefit of the shipper*. 373 U.S. at 409, 83 S.Ct. at 1372-1373.

Defendant's second argument is that the government failed to prove that property was transported at a rate less than that provided in the tariff and consequently failed to prove that defendant granted concessions. Defendant bases this contention on the stipulation by the parties that defendant collected applicable transportation charges on each of the shipments for which Elkins Act violations were charged. It was never disputed in this action that defendant collected the amount of money called for in the tariff for each shipment. However, no dispute existed that defendant provided a further service free of charge to its shippers — payment of the trip permit fee. Thus, although defendant nominally collected the full, lawful tariff rate, defendant's five dollar

payment rendered on behalf of its shippers for each shipment constituted an obvious reduction in the effective tariff rate.

Finally, defendant contends that this prosecution under a criminal statute which affords no notice of criminally-proscribed conduct violates defendant's right to due process of law. This contention is unpersuasive. As the *Braverman* court noted, the language of the Elkins Act could not be more unequivocal in barring *any* departure from the lawful tariff rate as published by the carrier. The Fourth Circuit rejected a similar challenge to the constitutionality of the Elkins Act in *United States v. North Carolina Granite Corporation,* 288 F.2d 232, 235 (4th Cir. 1961):

u503The defendant makes the additional contention that the penal statute [Elkins Act] on which the indictment is grounded is unconstitutional insofar as it is based on the tariff, since the term 'actual value' used in the tariff is too vague and uncertain to sustain a prosecution for crime. . . . There is no substance in this point. The uncertainty of which the defendant complains rests not in the meaning of the tariff but in the variety of circumstances to which it must be applied, a condition commonly encountered in applying a governing statute to the facts of a particular case."

VI. *Conclusion.*

Therefore, the Court finding that defendant's motions for a new trial, for judgment of acquittal, and for arrest of judgment each lack merit, it is ORDERED that each motion be and hereby is DENIED.

The Clerk of the Court shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: March 11, 1980.

/s/ ROBERT J. KELLEHER
Robert J. Kelleher
United States District Judge.

EXHIBIT D.

UNITED STATES CODE

TITLE 49

§ 41. Liability of corporation carriers and agents; offenses and penalties

Liability of corporation common carriers; offenses; penalties; jurisdiction

(1) Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named

in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

EXHIBIT E.

Section 1 — Miscellaneous Commodity Rates.

Item 6950-A:

ARTICLES:

(Waiver Rules 4(c), 4(i), 7(a), 7(b) and 27 of Tariff Circular 20 authorized ICC Permission 73193 and ICC Permission 73-2040). Freight, all kinds, in trailers and/or containers on flat cars, subject to Notes 1 to 13, 17, 18, 19, 20, 22, 23, 28, 32, 33, 35, 36, 37 and 38 and Item 1071.

Trailers and/or Containers, empty, on flat cars, subject to Note 1(c) and Notes 2 to 12, 17, 18, 19, 28, 32, 35 and 36 and Item 1071.

FROM:

Chicago, IL; Kansas City, MO; Milwaukee, WI; St. Louis, MO.

TO:

Points shown in Note A.

RATES IN CENTS PER 100 LBS (Except as noted):

$1344.43.

RATE IN DOLLARS PER FLAT CAR:

NOTE A.-Points as follows:

Chico	CA	Los Angeles	CA
Concord	CA	Los Angeles Harbor	CA
East Portland	OR	Manteca	CA
East San Pedro	CA	①Modesto	CA
Eugene	OR	Phoenix	AZ
Long Beach	CA	Portland	OR
Longview	WA		
Reno	NV	Spokane	WA
San Diego	CA	Tacoma	WA
San Francisco	CA	Turlock	CA
San Jose	CA	Wilmington	CA

San Pedro ..... CA Woodland ..... CA
Seattle .....WA Yakima .....WA

NOTE 1.-

(a) APPLICATION OF RATES, subject to Note 16:

(1) Rate applies only when no one commodity or commodities in the same rate item in this tariff taking the same rate on the flat car exceeds {8 36,000 / 9 40,000} lbs, (Subject to subparagraph (1) of paragraph (b)). The weight of the lading at this charge shall not exceed 60,000 lbs. Weight in excess of 60,000 lbs, less the weight of contraband per sub-paragraph (1) of paragraph (b), will be rated at (NS12) 194 cents per 100 lbs.

(3) The weight of the lading in each trailer or container must not exceed 45,000 lbs. When a loaded trailer or container is found in transportation with lading in excess of 45,000 lbs. freight charges on lading in excess of 45,000 lbs in such trailer or container shall be collected on basis of Class 100 rate in effect in TCFB Tariff 1015-A, ICC 1688, on the actual weight of such excess over 45,000 lbs, not subject to readjustment of charges, and the charges, resulting from the use of such Class 100 rates shall be in addition to all other charges collected under the terms in this item.

(b) When a shipment is found in transportation not complying with the provisions of subparagraph (1) of paragraph (a) of this note, the following applies:

(1) The excess over {8 36,000 / 9 40,000} lbs, will be considered contraband and charges assessed thereon at rate of 526 cents per 100 lbs.

(c) INTERMEDIATE RULE:

(The provisions of Items 1500 and 1505 do not apply)

(1) (The provisions of this paragraph do not apply from points located north of the Ohio River and east of the Illinois-Indiana State Line, nor from points located south of the Ohio River and east of the Mississippi River, except will apply from Baton Rouge, LA, Memphis, TN, Natchez, MS, New Orleans, LA or Vicksburg, MS).

On shipments of loaded or empty trailers or containers moving under the provisions of this item from a point of origin not named in this item, which is directly intermediate from Chicago, IL, Kansas City, MO, Milwaukee, WI or St. Louis, MO, the charge to apply from such unnamed intermediate point will be the charge published herein from Chicago, IL, Kansas City, MO, Milwaukee, WI or St. Louis, MO.

(2) On shipments of loaded or empty trailers or containers moving under the provisions of this item to a point of destination not named in this item which is directly intermediate to points named in Note A, the charge to apply to such unnamed intermediate point will be the charge published herein to points named in Note A.

(d) When suitable flat cars are available at origin capable of handling trailers or containers with total length not exceeding 85 feet, rates and charges named in this item will also apply when consignor tendered trailers or containers consisting of one unit not exceeding 45 feet in length and one unit not exceeding 40 feet in length (Subject to Note 29) (exception to Note 2(C) and Note 4(B)). Participating carriers will not furnish trailers or containers exceeding 40 feet in length under the provisions of Part 1, Item 1072.

NOTE 2.-APPLICATION OF SERVICE:

(A) (Subject to Item 1072) Flat cars, trailers and containers shall be furnished by the shipper or his agent. All such equipment shall be approved by the railroad.

(B) Rate includes the loading of trailers or containers on the flat car by the rail carrier at rail carrier's permanent facilities provided for such operations and the unloading of trailers or containers from the flat car by the rail carrier at rail carrier's permanent facilities provided for such operations (does not include facilities for interchange with common or charter carriers of any type).

(C) Total length of Trailers or Containers (See Note 26) or both to be loaded or transported on one flat car shall not exceed $\{^{5}_{6}\ ^{80}_{81}\}$ feet in overall length.

NOTE 3.-DESCRIPTION OF COMMON CARRIERS TRANSPORTATION:

(A) All necessary packing and stowing of the goods in the container or trailer shall be performed by the shipper or his agent and transportation service authorized by this item does not include any service for packing, bracing or stowage of goods.

(B) Carrier shall not be required to furnish refrigeration, heating, ventilation, or other protective service (See Note 14).

NOTE 4.-SPECIFICATION FOR FLAT CARS, TRAILERS, AND/OR CONTAINERS:

Flat cars, Trailers and/or Containers furnished by the shipper must comply with the following specifications:

(A) The height and/or width above top of rail of the Trailer and/or Container when loaded on the flat car must not be in excess of the published clearances as prescribed over the route of movement in Railway Line Clearance unless otherwise authorized by the railroad.

Flat cars utilized under the provisions of this tariff will not be subject to Mileage Tariff 7, Agent J.F.Doyle's ICC H-32, and the railroad will not pay a mileage allowance to the owner of the flat cars.

(B) Trailer and Container specifications:

1. -Maximum length of trailer body or container to be not over 40 feet outside measurement.

2. -Maximum width of trailer body, container or load, 8 feet (outside measurement).

3. -Maximum tread (outside wall of tire to outside wall of tire) 8 feet, 6 inches.

4. -Maximum height of trailer or container, 13 feet 6 inches.

Closed trailers or containers must be equipped with closed side and/or end doors and such doors must be tightly fitted and have suitable locking and/or sealing devices on such equipment. Shipper must provide locks and/or seals to adequately secure the doors and protect the lading. Locks placed by shippers will be removed by consignee, and the carrier assumes no responsibility for the return.

Open-top or open-side trailers must have freight which is loaded therein properly secured and protected by tarpaulin or other adequate equipment.

Trailers must be in such condition as to comply with the carrier's rules regulating safe loading of trailers on flat cars and protection of equipment under the provisions of Rule 27 of Uniform Classification.

NOTE 5.-TERMS AND CONDITIONS:

When property is shipped at the rate herein, it is subject to terms and conditions stated in this item. A uniform bill of lading, in form prescribed by the Interstate Commerce Commission and shown in Uniform Classification, endorsed

"Shipper's load and count and shipper's weight", will be issued.

Such bill of lading must specify trailer and/or container number.

Shipper must certify on bill of lading the total weight of contents of each trailer or container and that contents of trailer and/or container do not violate provisions of this item.

A separate bill of lading will be issued for each flat car, except that when two or more cars are shipped on one day from one shipper served by one origin ramp point to one consignee served by one destination ramp point via one route, shipper may tender one bill of lading for the total number of flat cars shipped provided that the trailers and/or containers are matched or paired to constitute a flat car load and freight charges thereon will be assessed accordingly.

Rates will also apply on shipments of not more than two trailers tendered within two consecutive calendar days (See Note 30) from one shipper at one origin to one consignee at one destination on one bill of lading, subject to the provisions of Subparagraphs (a), (b) and (c) below:

(a) Both trailers of a two-trailer shipment must be delivered to the carrier's ramp or terminal within two consecutive calendar days (See Note 30) of each other.

(b) In tendering trailers under these provisions, shipper shall have given explicit consent to the carrier to load on the flat car or flat cars other trailers moving to the same destination ramp. As each trailer of a two-trailer shipment is delivered to the carrier's ramp or terminal location, sufficient shipping instructions (See Note 31) must be furnished to the carrier's agent to enable the carrier to forward each individual trailer independent of the other at carrier's convenience and only if there is another trailer available for

loading on the same flat car to same destination ramp. The charge for the two-trailer shipment will be the same as if the two trailers had been forwarded together on the same flat car. Trailers tendered under these provisions will under no condition be forwarded singly on a flat car to destination.

(c) In the event these provisions are not complied with charges on each trailer so shipped will be assessed on basis of actual weight subject to rates specified in Note 1, but not less than $1344.43 per trailer, in addition to all other applicable charges.

Shipper must either:

(a) Furnish for each bill of lading copies of manifest to the originating carrier within 24 hours, excluding Saturdays, Sundays and legal holidays (See Note 15), after the shipment reaches its destination, showing, subject to check and verification by carrier or its authorized representative:

(1) description of each article contained in the shipment and

(2) actual weight of each article contained in the shipment, or

(b) Provide certification in writing on bill of lading or shipping order, at time shipment is tendered, that the provisions of Item 6950, TCFB Tariff 1-X, ICC 1912 have been complied with, subject to check and verification by carrier or its authorized representative.

Rates in this item apply only on shipments for which the consignor or party in custody or control maintains shipper's records of sufficient completeness and accuracy to enable verification of correctness of entries on bill of lading or freight bill, or on certificates required herein, and upon request during business hours permits access for that purpose to carrier's agent or authorized representative. When such

shipper's records are maintained at origin or some other location other than destination, carrier's agent or authorized representative will also be permitted access upon request during business hours to whatever records or documents are available at destination, whether such records or documents are in the custody of consignor or his agent, consignee or his agent, or other party. If shipper's records are not of sufficient completeness and accuracy to enable verification of correctness, or if access is denied to carrier's agent or authorized representative, either to complete shipper's records or to whatever records or documents are available at destination, the rates named in this item do not apply and the shipment is subject to the Class 70 rate named in TCFB Tariff 1015-A, ICC 1688, applied on the total weight of the lading as defined in Note 1.

The Weighing and Inspection Bureau having jurisdiction is authorized to act as carrier's representative.

NOTE 6.-Rates do not apply on any of the following articles loaded in or loaded on trailers or containers:

Aninals, live.

Articles described under Rule 3 of Uniform Classification.

Articles as described in Items 92880, 92890, 92900, 93080, 93081, 93100 or 93110 of Uniform Classification.

Bulk Commodities.

Coal.

Coke.

Explosives as described in Classes A and B, Sections 173.53 through 173.93 of Agent R.M. Graziano's Tariff 27, ICC 27.

Fruits, fresh (not cold-pack nor frozen).

Game, Live,

Hides, Pelts or Skins, green salted.

Ice

Missiles, guided or Rockets, guided; Guidance Systems or Electronic Guidance Control Apparatus for installation in missiles or in missile sections; Missile or Rocket Frame Assemblies containing electronic apparatus, or Mobile Missile Guidance Control Systems, as described in Items 69093 through 69098 of Uniform Classification.

Motor Vehicles, frieght or passenger or combination of freight and passenger, complete or not complete, finished or not finished, except rates will apply on such motor vehicles when loaded in closed trailers.

Pigeons, live.

Poultry, live.

Radioactive Materials, as described in Items 80761 to 80768 of Uniform Classification.

Trailers, freight or tank as described in Item 6546.

United States Mail of any class.

Vegetables, fresh or green (not cold-pack nor frozen).

NOTE 7.-Transit privileges, other than reconsignment, will not be accorded in connection with shipments moving under the rates published in this Item (Subject to Item 185 of Western Railroads Rules Tariff 2-E, TCFB ICC 1906 of Trans-Continental Freight Bureau, Agent).

NOTE 8.-Shipments handled under this item by the ATSF are subject to the provisions of Item 560 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 9.-Shipments handled under this item by WP are subject to the provisions of Items 16715, 16780 and 16790 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 10.-Shipments handled under this item by SP are subject to the provisions of Item 13900 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 11.-Rates named herein to San Francisco, CA, include the movement of flat cars, from San Francisco to Oakland, Richmond or San Leandro, CA.

NOTE 12.-The provisions of Item 415 do not apply in connection with shipments moving under rate published in this item.

NOTE 13.-(a) (Provisions of this paragraph apply only in connection with the ③CNW, MILW, BN, PRTD, SOO or ③UP). Rates apply only on mixed carload shipments of two or more articles.

(b) (Provisions of this paragraph do not apply in connection with the ③CNW, MILW, BN, PRTD, SOO or ③UP). Rates apply only on mixed carload shipments of two or more commodities, with at least two of such commodities being named in different rate items.

NOTE 14.-Inspection of trailers containing freight requiring protective service will be subject to the provisions and charges published in Rule 815 of Perishable Protective Tariff 18, ICC 37. H.R. Brandl, Agent.

NOTE 15.-Legal Holidays are New Year's Day, Washington's Birthday, Memorial Day, see Note 24, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, except when a legal holiday falls on Sunday the following Monday will then be considered a legal holiday.

NOTE 16.-In applying the provisions of Note 1, the weight of commodities subject to actual or released values will be combined with the weight of the same commodities shown without such actual or released values. The combined

weight of such commodities will be treated the same as single commodity named in the same rate item.

NOTE 17.-Shipments handled under this item by BN are subject to the provisions of Items 2120 and 2140 of WTL Freight Tariff 457-I, ICC A-4910, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 18.-Shipments handled under this item by SN are subject to the provisions of Items 12720 and 12780 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 19.-Shipments handled under this item by TS are subject to the provisions of Item 15800 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

NOTE 20.-(Exception to Rule 11 of Uniform Classification):

(a) Except as provided in (b) below, charges shall be assessed on gross weight of contents of trailers and/or containers, excluding the weight of temporary flooring, blocking, racks, standards, stakes or similar bracing, dunnage or supports.

(b) When freight is prepared for shipment in conformity with packing requirements and, in addition, is loaded on pallets, platforms or skids, with or without standing sides or ends, but without tops, no charge will be made for the transportation of the pallets, platforms or skids, provided the shipper specified the weight of the pallets, platforms or skids on the bill of lading. (See Exceptions 1 and 2).

NOTE 22.-Shipments containing explosives or other dangerous articles are subject to Item 15.

NOTE 23.-Commodities shipped under the provisions of this item are subject to the same released valuation as provided in the Uniform Freight Classification. When more than one released valuation is provided for a commodity in the Uniform Freight Classification the lowest valuation for that commodity will apply as a released valuation when shipped under the rates authorized in this item.

The articles will be accepted for transportation at the rates named in this tariff provided the released valuation is entered on the shipping order and bill of lading in the following form:

The agreed or declared value of commodities included in this (carload or trailerload) shipment is hereby specifically stated by the shipper to be not exceeding the released valuation as provided for in the Uniform Freight Classification. When more than one released valuation is provided for any commodity included in this shipment in the Uniform Freight Classification the lowest valuation for that commodity will apply as a released valuation when shipped under rates authorized in tariffs making reference to Released Rates Order No. 1336 of September 27, 1972, as amended October 26, 1972.

_____

(Signature of Consignor)

When the foregoing statement is properly executed, the rates subject hereto will take precedence over all other rates not subject to released value, provided the released rates result in lower freight charges. If lower freight charges do not result, the released will be deemed not to have been executed and the rates subject hereto will have no application.

If the shipper fails or declines to execute the above statement or designates a value for the article exceeding that specified, the article will not be accepted for transportation at the rates subject hereto and rates published in other tariffs lawfully filed with the Interstate Commerce Commission will apply.

The released value shall be deemed to relate to the gross weight of each shipping package separately if shipped in packages or to each pound separately if shipped loose and not to the shipment as a whole. In case of loss or damage to a portion of the shipment, the amount recoverable will be the released value per pound multiplied by the weight of the lost or damaged portion, but not more than actual loss or damage.

Rates herein based on the released value have been authorized by the Interstate Commerce Commission by Released Rates Order No. 1336 of September 27, 1972, as amended October 26, 1972, subject to complaint or suspension.

NOTE 24.-Where provisions of State Laws vary, the day referred to as Memorial Day being obscure, the date of the day referred to in the different states as "Memorial Day", "Decoration Day" or otherwise and generally observed in lieu thereof, will for the purpose of this item be treated as Memorial Day.

NOTE 26.-(Applies only in connection with the QAP and SLSF) when from or to QAP and SLSF stations, containers must be offered with chassis which will permit loading or unloading of the flat car. Provisions of this note not applicable when QAP or SLSF is an intermediate carrier nor in connection with combination rates from or to connection.

NOTE 28.-Subject to Items 190, 215, 216, 330 and 340 of Western Railroads Rules Tariff 2-E, TCFB ICC 1906.

Other provisions of Western Railroads Rules Tariff 2-E, TCFB ICC 1906, are applicable only to the extent indicated in Note 7 of this item or in Part 1, Item 1072 of this tariff.

NOTE 29.-Will not apply when shipments are loaded in mechanical trailers with nose mounted refrigerated unit.

NOTE 30.-When considering "two successive calendar days", Sundays and Holidays will be excluded (See Note 15).

NOTE 31.-The term "Sufficient shipping instructions"includes name of the consignee, destination ramp or terminal, route and any required Protective Service or dangerous articles information or instructions. Such "Sufficient shipping instructions" shall be furnished in writing or otherwise as agreed to in writing.

NOTE 32.-Shipments handled under this Item by MILW are subject to the provisions of Item 6695 of WTL Freight Tariff 457-I, ICC A-4910 and where substituted service as authorized is performed, rates named herein will apply. (Rules 4(b), 4(i) and 4(k) of Tariff Circular waived; ICC Permission 75654).

NOTE 33.-The following article will be accepted for transportation at the rate subject hereto only when carriers are released by the shipper from all liability in excess of the valuation shown below:

COMMODITY

Government stamped Envelopes, not protected by government locks or seals.

RELEASED VALUATION:

$0.50 per pound.

The article will be accepted for transportation at the rates named in this tariff if shipping order and bill of lading designated the weight thereof and a released valuation not exceeding the value specified for said article. The released

value must be entered on the shipping order and bill of lading in the following form:

"The agreed or declared value of (name the commodity) included in this mixed (carload or trailerload) shipment is hereby specifically stated by the shipper to be not exceeding _____ per _____".

If the shipper fails or declines to execute the above statement, or designates a value for the article exceeding that specified, the article will not be accepted for transportation at the rates subject hereto, and rates published elsewhere in this tariff or in other tariffs lawfully filed with the Interstate Commerce Commission will apply.

The released value shall be deemed to relate to the gross weight of each shipping package separately if shipped in packages or to each pound separately if shipped loose and not to the shipment as a whole. In case of loss or damage to a portion of the shipment, the amount recoverable will be the released value per pound multiplied by the weight of the lost or damaged portion, but not more than the actual loss or damage.

Rates herein based on the released value have been authorized by the Interstate Commerce Commission by Released Rates Order No. 1336 of September 27, 1972, as amended October 26, 1972, subject to complaint or suspension.

NOTE 35.-

(1) Provisions of this item will also apply on tariff having a prior movement by motor common carrier between point of interchange with the railroad on the one hand and locations beyond the railroad terminal area on the other hand.

(2) At rail origin after trailer is interchanged from motor carrier to railroad, the provisions of Paragraphs (A) and (B) below will apply.

(A) TRAILER STORAGE: 24 hours free time Saturday, Sundays and Holidays included, will be allowed the shipper to furnish railroad billing instructions. After expiration of free time storage charges in Item 215 of Western Railroads Rules Tariff 2-E, TCFB ICC 1906 will be assessed against the shipper until time and date billing instructions are received by the railroad. These charges are in addition to charges applicable under Paragraph (B).

(B) TRAILER DETENTION: If billing instructions are not furnished to railroad within 24 hours computed from the first 11:59 PM following interchange of trailer to railroad, detention charges as provided in Item 1072, Part 1 of this tariff under the heading of "Dentention Charges for Trailers", will be assessed against the shipper until time and date billing instructions are received by the railroad. Saturdays, Sundays and Holidays will be excluded in computing free time. These charges are in addition to charges applicable under Paragraph (A).

(3) Trailers interchanged to motor common carriers for movement beyond the billed rail origin will be subject to per diem agreements applicable between the rail carrier and motor common carrier, and railroad tariffs will not apply while trailer is in possession of motor common carrier.

(4) The provisions of this item apply only in connection with motor common carriers with whom the interchanging railroad maintains a written agreement covering interchange of trailers, and then only when consignor or consignee furnishes interchanging railroad with a complete certificate or motor common carrier billing in the following form:

ORIGIN CERTIFICATE

_____ hereby certifies that Trailer _____
(Consignor) (Number)
delivered to your terminal at _____
(Railroad Origin)
by _____ on _____ was loaded at
(Motor Carrier) (Date-Time)
_____ _____ hereby
(Motor Carrier Origin) (Consignor)
accepts responsibility for this trailer as of the time and date trailer was delivered to your terminal.

_____
Signature

Completed certificate or copy of motor carrier billing showing same information must be furnished to interchanging railroad at time loaded trailer is delivered or regular tariff detention provisions will apply from the time trailer was originally delivered to the motor carrier.

NOTE 36.-Rail carriers party to this item will not allow their bond to be used on bonded shipments moving under the rates and other provisions of this item. Rates and other provisions of this item will apply on bonded shipments when moving under a bond other than that of rail carriers party to this item but it will be the full responsibility of the person or company bonding the shipment to assume full responsibility and liability for all additional costs and expense of Custom House clearances at origin and destination, including applicable detention and-or storage charges if any. Rail lines parties to this item will also not advance any charges for Customs House entries and/or clearances.

NOTE 37.-Rates will apply on Clothing, noibn [sic], hanging on hangers or racks, in boxes or other than in boxes. Rates do not include free return of racks or hangers.

NOTE 38.-Shipments handled under this item by OE are subject to the provisions of Item 8270 of WTL Freight Tariff 457-I, ICC A-4910, supplements thereto or successive issues thereof, and where substituted service as authorized is performed, rates named herein will apply.

EXCEPTION 1.-When material, not a part of the pallet, platform or skid, is used to protect top of lading or to secure the load to the pallet, platform or skid, allowance will be made for the weight of the pallet, platform or skid, but not for the weight of such material.

EXCEPTION 2.-The weight of the pallets, platforms or skids, may not exceed 3 per cent of the total weight of the shipment including the weight of the pallets, platforms or skids. Any weight of the pallets, platforms or skids in excess of 3 per cent of the total weight of the shipment will be subject to rate on the freight loaded thereon.

①When in connection with TS applies only via Gateways 63A or 63C, see Item 14005.

③Only to points in Oregon and Washington.

⑤Does not apply in connection with carriers named in ⑥reference mark.

⑥Applies only in connection with the following carriers:

ATSF	RI	MKT	QAP	SSW	TS
BN	CS	MP	RSP	SOO	UP
CEI	DRGW	NWP	SLSF	SP	VE
CNW	FWD	PMT	SDAE	TP	WP
MILW	HI	PSR	SN	TM	

⑧Does not apply in connection with carriers named in ⑨reference mark.

⑨Applies only in connection with the following carriers:

ANR	CS	KCS	QAP	SP	TP
ATSF	DRGW	LA	RI	SN	TS
BN	MILW	MKT	RSP	SSW	UP

CEI	FWD	MP	SLSF	SOO	WP
CNW	ICG	NW	OE	SDAE	TM

EXHIBIT F.

Tariff 1-X
Rules and Other Governing Provisions
Special Rules and Regulations
Limited

ITEM: 1072

SUBJECT Accessorial Charges

APPLICATION:

(Applicable only when specific reference is made to this item)

④PART 1

(1) TRAILERS FURNISHED BY CARRIER

Carriers are not obligated to furnish trailers. However, where trailers as specified in Note 4 of Item 6950 are furnished by the carriers, the following additional charges will be assessed for each trailer furnished and will apply for one-way rail movement, subject also to the detention charges and rules herein provided.

Open Top Vans or ⑥Closed Vans	Mechanical Refrigerator Vans Moving Under Protective Service
(NS)$74.87	③$161.33

(2) CONTAINERS FURNISHED BY CARRIER

Carriers are not obligated to furnish containers. However, where containers (without wheels; See Note 2) as specified in Note 4, Item 6950, are furnished by the rail carriers, the following additional charges will be assessed for one-way rail movement, subject to the detention charges and rules herein provided:

(a) For each set of two containers, each container having maximum length of twenty feet but

not less than 19 feet in length, outside measurement $76.42

(b) For each set of two or more containers (except as provided in paragraph (a)) not exceeding a total combined length of eighty feet, each container not less than 19 feet in length, outside measurement, not moving in protective service $152.84

(c) For each set of two or more containers (except as provided in paragraph (a)) not exceeding a total combined length of eighty feet, each container not less than 19 feet in length, outside measurement, with one or more containers moving in protective service .....③$322.66

(d) For each single container, not exceeding forty feet in length but not less than 19 feet in length, outside measurement, not in combination with other containers, not moving in protective service $76.42

(e) For each single container, not exceeding forty feet in length but not less than 19 feet in length, outside measurement, not in combination with other containers, moving in protective service .....③$161.33

DETENTION CHARGES FOR TRAILERS OR CONTAINERS

In addition to the above charges, trailers or containers furnished by the carrier will be subject to the following:

A. Computing Time

When due to no disability, fault or negligence on the part of the carrier, the loading or unloading of freight is delayed and carrier's trailer or containers is detained beyond the free time described below, the following rules will govern:

(1) (a) Consignors will be allowed 24 hours free time at origin after notification that trailers or containers are available for loading and consignees will be allowed 24 hours free time at destination after notification that trailers or containers are available for unloading. (See Subparagraphs (b), (c) and (d) below for notification procedures and computation of free time).

(b) Except as provided in Subparagraph (c) below, the notification that trailers or containers are available for loading or unloading, as the case may be, will be given by telephone between the hours of 8:00 AM and 5:00 PM, and at additional hours when there is prior mutual agreement in writing between the consignor or consignee, on the one hand, and the carrier, on the other hand, that telephone notification may be given during additional hours. If so requested, confirmation in writing will be made of a telephone notification. When notification is given under the provisions of this Subparagraph (b), free time will be computed from the first 11:59 PM following the telephone notification, excluding Saturdays, Sundays and holidays (See Paragraph (3) below).

(c) In the event that carrier is unable to give notification by telephone that trailers or containers are available for loading or unloading, as the case may be, the notification will be made in writing by the carrier's agent simultaneously mailing two post cards, one addressed to the consignor or consignee, as the case may be, and one addressed back to himself. The postmark date on the post card sent to himself will be used by the carrier's agent to compute free time, with the free time being computed

from 11:59 PM of the postmark date, excluding Saturdays, Sundays and holidays (See Paragraph (3) below).

(d) When a trailer or container is removed from carrier's premises by the consignor or consignee, as the case may be, prior to any notification being given per either Subparagraph (b) or Subparagraph (c) above, such removal will constitute notification and the free time will be computed from the first 11:59 PM following such removal, excluding Saturdays, Sundays and holidays (See Paragraph (3) below).

(2) When detention accrues following termination of free time as determined under Paragraph (1) above, such detention will accrue on each day trailer is detained, including subsequent Saturdays, Sundays and Holidays.

(3) Holidays as referred to above mean only the following:

New Year's Day
Washington's Birthday
Memorial Day (see Note 3)
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

In event any one of the holidays occurs on a Sunday the following Monday will be considered a holiday.

B. Charges and Rules

After expiration of free time as described above, detention charges for each 24 hours or fraction thereof will be assessed as follows, including Saturdays, Sundays and holidays:

(3) TRAILERS

Open Top Vans or Closed Vans	Mechanical Refrigerator Vans With Refrigeration Units Operating During Detention
$13.74	$26.11

(4) CONTAINERS

(a) For each set of two containers, each container having maximum length of twenty feet but not less than nineteen feet $13.74

(b) For each set of two or more containers (except as provided in paragraph (a)) not exceeding a total combined length of eighty feet, each container not less than 19 feet in length, outside measurement, not moving in protective service $27.48

(c) For each set of two or more containers (except as provided in paragraph (a)) not exceeding a total combined length of eighty feet, each container not less than 19 feet in length, outside measurement, with one or more containers moving in protective service $52.21

(d) For each single container, not exceeding forty feet in length but not less than 19 feet in length, outside measurement, not in combination with other containers, not moving in protective service $13.74

(e) For each single container, not exceeding forty feet in length but not less than 19 feet in length, outside measurement, not in combination with other containers moving in protective service $26.11

When consignor or his agent takes the delivery of empty trailer or container at railroad ramp at origin, or consignee or his agent takes delivery of loaded trailer or container at railroad ramp at destination and operates such trailer or

container subject to charges hereinabove provided, the following will apply:

1. Consignee, consignor or his agent agrees that during the period in which trailer or container is in his possession or in the possession of his agent to hold the carrier furnishing the trailer harmless or container(s) from all liability for damages to person or property arising out of the use, operation or maintenance or custody of said trailer or container(s), or arising from any other cause, until said trailer or container(s) has been returned to the carrier.
2. In the event a trailer or container is damaged while in the possession of consignor, consignee or his agent, consignor, consignee or his agent shall by repair, restore it to the condition in which it was received and in event of failure of such party to make such repair, it shall, nevertheless, be responsible for the cost thereof, but in no case for an amount greater than the actual cash value of such trailer or container(s) before damage.
3. Carrier supplying trailer or container shall endeavor, to the best of its ability, to furnish trailer or container in good operating condition. However, carrier makes no warranty or representation, expressed or implied, as to the fitness or condition of the trailer or container furnished and the consignor, consignee or his agent using the trailer or container during the period it is in consignor's, consignee's or his agent's possession does so at his own risk.

PART 2
FLAT CARS FURNISHED BY CARRIER

Carriers are not obligated to furnish flat cars. However, where flat cars are furnished by the carrier an additional charge of $49.53 will be assessed for each flat car furnished and will apply for one-way revenue movement subject also to demurrage charges and demurrage rules provided in Agent J.F. Doyle's Tariff 4-J, ICC H-59.

PART 3

Rail carriers are not obligated to couple chassis or to uncouple chassis that are used to transport containers over the highway. However, when a rail carrier maintains suitable facilities to perform such service and is requested to do so by consignor, consignee or a connecting carrier, the following charges apply and are due from the party requesting the service:

For Each Service of Coupling Two Chassis, Each not Exceeding 20 Feet in Length, Outside Measure, With or Without Containers Loaded Thereon
$14.86
For Each Service of Uncoupling Two Chassis, Each not Exceeding 20 Feet in Length, Outside Measure, With or Without Containers Loaded Thereon
$14.86

NOTE 1.-Where mechanical refrigerator vans with refrigeration units not operating are furnished for shipment to destinations in Arizona, California, Nevada, New Mex-

ico, Oregon, Utah and Washington, charge will be $67.93 for each trailer furnished.

NOTE 2.-Carriers will not furnish bogies or wheels for containers.

NOTE 3.-Where provisions of State Laws vary, the day referred to as Memorial Day being obscure, the date of the day referred to in the different states as "Memorial Day", "Decoration Day" or otherwise, and generally observed in lieu thereof, will for the purpose of this item be treated as Memorial Day.

③Inspection of trailers or containers containing freight requiring protective service will be subject to the provisions and charges published in Rule 815 of Perishable Protective Tariff 18, ICC 37, H.F. Brandl, Agent.

④Subject to Items 200 and 230 of Western Railroads Rules Tariff 2-D, ICC 1855 of Trans-Continental Freight Bureau, Agent.

⑤Subject to Note 1.

(NS) Not subject to Items X-299, X-303 and X-305.

Issued in compliance with order of the Interstate Commerce Commission in Ex Parte 230.